Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-404 OF 1990
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI SCJ AND ANUAR J
13 MAY 1993

Bankruptcy *— Notice and petition — Bankruptcy notice and petition based on contract of guarantee — Counterclaim by respondent — Counterclaim exceeded or equalled judgment sum — Whether counterclaim could be a defence to judgment creditor's petition — Principles applicable — Bankruptcy Act 1967 s 3(1)(i)*

Bankruptcy *— Secured creditor — Whether appellant was secured creditor under contract of guarantee — If so whether non-compliance with s 5(2) of the Bankruptcy Act 1967 was fatal to the petition — Bankruptcy Act 1967 s 5(2)*

Words and Phrases *— 'Secured creditor' — Bankruptcy Act 1967 s 5(2)*

Words and Phrases *— 'Debtor' — Bankruptcy Act 1967 ss 2 & 5(2)*

The appellant bank gave credit facilities to San Hong Brick Sdn Bhd ('the principal borrower') and pursuant to the loan agreement, a contract of guarantee was executed by the respondent together with three other directors of the principal borrower, in their personal capacity. The principal borrower failed to make repayment of the banking facilities given by the appellant bank in breach of the loan agreement and the appellant bank had taken action to recover the loan by winding-up proceedings against the principal borrower. It had also obtained a summary judgment of RM11,272,312.43 against the respondent under the contract of guarantee and the summary judgment was upheld by the High Court and was accepted as a final judgment in which no stay of execution had been granted, despite the fact that a statement of defence and a counterclaim had been filed by the respondent against the bank for the sum of RM6.25m as special damages and unspecified sum in general damages. The appellant bank took out a bankruptcy petition against the respondent but the High Court judge held that the respondent's counterclaim exceeded or equalled the judgment sum of RM11.2m on which the bankruptcy notice against the respondent was based and that s 5(2) of the Bankruptcy Act 1967 ('the Act') was applicable and the failure to comply with the condition imposed by that section was fatal to the creditor's petition. He therefore ordered that the appellant's bankruptcy petition be struck out. The appellant bank has appealed.

Held, allowing the appeal:

(1) The summary judgment in this case was a regular and final judgment and the respondent had failed to show that the loan

transaction and the guarantee agreement were invalid or tainted with irregularities.

(2) Three ingredients must be satisfied before the existence of a counterclaim by the debtor can be a defence to a judgment creditor's petition. The burden of proof is on the respondent to show by the affidavit that the counterclaim must be capable of being quantified in terms of money and the affidavit must quantify it. Secondly, the counterclaim must be put forward in good faith and must have reasonable probabilities of success and lastly, the affidavit must show that the counterclaim could not have been set up in the action in which the judgment relied on by the creditor was obtained. Here, the counterclaim was not quantified in terms of money and further, the probability of success of the counterclaim had not been mentioned or shown in the affidavit. Finally, the fact that the respondent had filed the counterclaim before the actual hearing of the O 14 application was not in dispute, and as such he could not now say that the counterclaim was one which he could not set up when the summary judgment was obtained within the meaning of s 3(1)(i) of the Act. Having failed to satisfy all the three ingredients in his affidavits, it was clear that the respondent had not proved that he had a counterclaim which equalled or exceeded the appellant bank's claim within the meaning of s 3(1)(i) of the Act.

(3) It was wrong for the learned judge to extend the application of s 3(1)(i) to cover all pending counterclaims irrespective of whether they could or could not have been filed at the hearing in which summary judgment was obtained. Such an interpretation would be tantamount to altering the words used by the legislature in s 3(1)(i) and ignoring the established principle of interpretation of statutes where the literal meaning of words used is clear and reflective of the purpose of the provision. The striking out of the appellant bank's petition on this ground was therefore wrong in law.

(4) What was crucial here was to determine whether under s 5(2) of the Act, the appellant bank as a petitioning creditor was a 'secured creditor' not in the loan agreement with the principal borrower, but under the contract of guarantee with the respondent from which had emanated the respondent's liability in the O 14 judgment and upon which in turn the bankruptcy notice and petition were based. The word 'debtor' appearing in both ss 2 and 5(2) must mean and should be limited to the actual 'debtor' involved in the particular bankruptcy proceeding and should not include any other debtors that may exist. Thus, in this particular petition, to clothe the appellant bank as a 'secured creditor' under s 5(2), it must be shown that the appellant bank was holding a mortgage, charge or lien on the property of the respondent, as a security for the debt of RM11.2m due to the bank from the respondent. It was common ground that the respondent had not given any security to the bank for his debt as a guarantor, thus, in this

particular bankruptcy proceeding as far as the respondent was concerned, the appellant bank was not a secured creditor within the meaning of s 5(2), and as such non-compliance with its requirement could not be fatal to the petition.

[Bahasa Malaysia summary

Bank perayu telah memberi kemudahan kredit kepada San Hong Brick Sdn Bhd ('peminjam prinsipal itu') dan mengikut perjanjian pinjaman itu, suatu kontrak jaminan telah dilaksanakan oleh penentang bersama dengan tiga pengarah peminjam prinsipal yang lain, atas kedudukan peribadi. Peminjam prinsipal gagal membuat bayaran balik kemudahan perbankan yang telah diberikan oleh bank perayu mengingkari perjanjian pinjaman itu dan bank perayu telah mengambil tindakan untuk mendapat balik pinjaman itu melalui prosiding penggulungan terhadap peminjam prinsipal itu. Perayu juga telah memperolehi penghakiman terus sebanyak RM11,272,312.43 terhadap penentang di bawah kontrak jaminan itu dan penghakiman terus itu telah disahkan oleh Mahkamah Tinggi dan telah diterima sebagai penghakiman muktamad di mana penggantungan pelaksanaan tidak diberi, walaupun pernyataan pembelaan dan tuntutan balas telah difailkan oleh penentang terhadap bank itu untuk mendapat RM6.25 juta sebagai ganti rugi khas dan suatu jumlah yang tidak ditentukan sebagai ganti rugi am. Bank perayu telah mengeluarkan suatu petisyen kebankrapan terhadap penentang tetapi hakim Mahkamah Tinggi telah memutuskan bahawa tuntutan balas penentang melebihi atau sama dengan jumlah penghakiman, iaitu RM11.2 juta, atas mana notis kebankrapan penentang berasas dan bahawa s 5(2) Akta Kebankrapan 1967 ('Akta itu') terpakai dan kegagalan mengikuti syarat yang dikenakan oleh seksyen itu akan membawa padah kepada petisyen pemiutang itu. Oleh itu, beliau telah mengarahkan supaya petisyen kebankrapan perayu dibatalkan. Bank perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Penghakiman terus di dalam kes ini adalah suatu penghakiman yang mengikut peraturan dan muktamad dan penentang telah gagal menunjukkan bahawa transaksi pinjaman itu dan perjanjian jaminan itu adalah tidak sah atau di luar aturan.

(2) Tiga perkara mesti dipenuhi sebelum kehadiran tuntutan balas penghutang boleh menjadi suatu pembelaan terhadap petisyen pemiutang penghakiman. Beban membukti terletak atas penentang untuk menunjukkan melalui afidavit bahawa tuntutan balas itu dapat dinyatakan kuantitinya dalam bentuk wang dan afidavit itu mesti menyatakan kuantitinya. Kedua, tuntutan balas itu mesti dikemukakan dengan niat baik dan mesti terdapat kemungkinan kejayaan yang munasabah dan akhirnya, afidavit itu mesti menunjukkan bahawa tuntutan balas itu tidak dapat dibentangkan dalam tuntutan di mana penghakiman yang digantung oleh

pemiutang didapati. Di sini, tuntutan balas itu tidak dinyatakan kuantitinya dalam bentuk wang dan lebih-lebih lagi, kemungkinan kejayaan tuntutan balas itu tidak dinyatakan atau ditunjukkan di dalam afidavit itu. Akhirnya, hakikat bahawa penentang telah memfailkan tuntutan balas itu sebelum pembicaraan sebenar permohonan A 14 itu tidak dipertikaikan, dan oleh itu beliau tidak dapat menyatakan sekarang bahawa tuntutan balas itu adalah suatu yang beliau tidak dapat membentangkan apabila penghakiman terus diperolehi dalam maksud s 3(1)(i) Akta itu. Oleh kerana penentang telah gagal memenuhi ketiga-tiga perkara itu di dalam afidavitnya, penentang jelas tidak membuktikan bahawa beliau mempunyai suatu tuntutan balas yang melebihi atau sama dengan tuntutan bank perayu itu di dalam maksud s 3(1)(i) Akta itu.

(3) Hakim yang arif silap apabila memperluaskan penerapan s 3(1)(i) untuk melingkungi kesemua tuntutan balas yang belum selesai tidak kira sama ada ia boleh atau tidak difailkan di perbicaraan di mana penghakiman terus diperolehi. Tafsiran sedemikian sama seperti menukar perkataan-perkataan yang digunakan oleh badan perundangan di dalam s 3(1)(i) dan tidak menghiraukan prinsip-prinsip tafsiran statut yang sudah mantap di mana makna perkataan harafiah adalah jelas dan membayangkan maksud peruntukan itu. Oleh yang demikian, pembatalan petisyen bank itu atas alasan ini adalah salah dari segi undang-undang.

(4) Apa yang penting di sini adalah untuk menentukan sama ada di bawah s 5(2) Akta itu, bank perayu sebagai pemiutang mempetisyen adalah suatu pemiutang bercagar bukan dalam perjanjian pinjaman dengan peminjam prinsipal itu tetapi di bawah kontrak jaminan dengan penentang dari mana datangnya liabiliti di bawah penghakiman A 14 itu dan di atas mana notis dan petisyen kebankrapan itu berasas. Perkataan 'debtor' yang muncul di dalam ss 2 dan 5(2) bermaksud dan sepatutnya terhad kepada 'debtor' sebenar yang terlibat di dalam prosiding kebankrapan itu dan tidak patut melingkungi penghutang lain yang mungkin wujud. Oleh itu, di dalam petisyen ini, untuk menyifatkan bank perayu sebagai seorang 'secured creditor' di bawah s 5(2), mestilah ditunjukkan bahawa bank perayu memegang suatu gadai-janji, gadaian atau lien atas harta penentang, sebagai jaminan untuk hutang sebanyak RM11.2 juta yang terhutang kepada bank oleh penentang itu. Tidak dipertikaikan bahawa penentang tidak memberi sebarang jaminan kepada bank itu untuk hutangnya sebagai seorang penggerenti, oleh itu, di dalam prosiding kebankrapan ini sejauh mana yang berkaitan dengan penentang, bank perayu bukanlah pemiutang bercagar di dalam maksud s 5(2), dan ketidakpatuhan yang sedemikian dengan kehendak seksyen itu tidaklah membawa padah kepada petisyen itu.]

Cases referred to

1 *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (refd)
2 *Rolled Steel Products (Holdings) Ltd v British Steel Corp & Ors* [1986] Ch 246; [1985] 3 All ER 1; [1985] 2 WLR 908 (refd)
3 *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 (refd)
4 *Re a debtor (No 75N of 1982, Warrington), ex p the debtor v National Westminster Bank and another appeal* [1983] 3 All ER 545; [1984] 1 WLR 353; (1984) 128 SJ 31 (refd)
5 *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 25 (refd)
6 *R v Broadcasting Complaints Commission, ex p Owen* [1985] QB 1153; [1985] 2 All ER 522; [1985] 2 WLR 1025 (refd)
7 *Re Rabindera Singh s/o Arjan Singh, ex p Malaysian International Bankers Bhd* [1989] 2 CLJ 858 (folld)
8 *Ex p Nest Riding Union Banking Co* (1881) 19 Ch D 108 (refd)
9 *Yip Kim Khoon v The Hongkong & Shanghai Banking Corp* [1991] 2 CLJ 1631 (overd)
10 *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 (refd)
11 *Development and Commercial Bank Bhd v Almas Motors Corp (M) Sdn Bhd* [1988] 3 MLJ 229 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 3(1)(i), 5(2)

Appeal from: Bankruptcy No D3–29–335–90 (High Court, Kuala Lumpur)

Matthias Chang (*ML Leong* with him) (*Suhaimi Khor Zulkifli & Chang*) for the appellant.

SA Lingam (*SA Lingam & Co*) for the respondent.

Mohamed Azmi SCJ (delivering the grounds of decision of the court): When allowing this appeal and setting aside the order of the High Court dated 11 September 1990 striking out the appellant's bankruptcy petition, we indicated that we would be giving our reasons. We do so now.

By a 1983 loan agreement, the appellant bank gave credit facilities to San Hong Brick Sdn Bhd (hereinafter referred to as 'the principal borrower') by way of a term loan and overdraft facility on the securities of: (1) a first legal charge created by the principal borrower over its 25.33 acres of land in Gurun, Kedah; (2) a debenture over fixed and floating charges over all the assets of the principal borrower; and (3) joint and several personal guarantees by Mr Samuel (the respondent), Mr Eng Bong Hiang, Mr Ooi Soo Nee and Madam Tan Phaik Thoo, who were all directors of the principal borrower. Pursuant to the loan agreement, a contract of guarantee was executed on 26 November 1983 by Mr Samuel together with the other three directors, in

their personal capacity. The guarantee was in the usual form in which the guarantors, inter alia, 'jointly and severally unconditionally and irrevocably guarantee payment on demand ... of all monies and liabilities whether certain or contingent now or hereafter owing or incurred to the bank' by the principal borrower 'on any account or in any manner whatever ...'

It was not in dispute that in breach of the loan agreement, the principal borrower had failed to make repayment of the banking facilities given by the appellant bank. It was also common ground that the appellant bank had taken action to recover the loan by winding-up proceedings against the principal borrower. On 26 February 1988, it had also obtained from the senior assistant registrar a summary judgment of RM11,272,312.43 against Mr Samuel under the contract of guarantee, comprising of RM3,861,938.32 being due on the term loan and RM2,702,885.36 under the overdraft facility together with interests thereon. The O 14 summary judgment of RM11.2m was upheld by the High Court, but an attempt by Mr Samuel to appeal out of time to the Supreme Court did not materialize. In the result, the summary judgment must be accepted as a final judgment in which no stay of execution had been granted, despite the fact that a statement of defence and a counterclaim had been filed by Mr Samuel against the bank for the sum of RM6.25m as special damages and unspecified sum in general damages. The counterclaim arose from Mr Samuel's defence in the O 14 proceedings in which he was the fifth defendant — the other four defendants being the principal borrower (the first defendant) and the remaining three co-guarantors cum directors (the second, third and fourth defendants). In essence, his defence was that the second, third and fourth defendants (the other three co-guarantors) had obtained the bank credit facilities for the principal borrower by false representation. By paras 8 and 9 of his defence, he contended that in order to induce the appellant bank to grant the banking facilities to the principal borrower (first defendant), the second, third and fourth defendants had manufactured false documents. By para 10, Mr Samuel also contended that the appellant bank in granting the facilities had acted recklessly not caring whether the documents produced by the second, third and fourth defendants were true or false. The appellant bank was also alleged to have assisted the second, third and fourth defendants in misusing the banking facilities by siphoning money from the account of the principal borrower for their own use to the detriment of the principal borrower and Mr Samuel himself. By reason thereof, Mr Samuel contended that the appellant bank was liable to him and as well as to the principal borrower for the losses incurred. It was on this basis, that the counterclaim was launched against the appellant bank for special and general damages.

We make no comments on any right of action that Mr Samuel might have had against the other three directors of the principal borrower, who were also his co-guarantors in the loan agreement. But clearly, the appellant bank owed no duty of care to Mr Samuel as a director/guarantor on such banking transaction, to ensure that the other directors of the principal borrower had acted within their authority. On the contrary, if there had been any malpractice in the internal affairs of the principal borrower, it was surely the duty of Mr Samuel as a director to take whatever action that was necessary to protect the interest of the company and its shareholders, and

to notify immediately the appellant bank of such alleged malpractice or fraud, instead of executing the contract of guarantee blindly and remaining completely silent until he was sued by the bank. In the circumstances of this case, it is our view that the defence as distinct from the counterclaim did not disclose any triable issue in the O 14 proceedings. In our opinion, on the authority of *Bank Negara Malaysia v Mohd Ismail & Ors*,[1] the assertions and denials made in the statement of defence were equivocal and lacking in precision when considered in the light of the rule in Foss v Harbottle and the provision of s 20 of the Companies Act 1965. Further, there was no allegation that the principal borrower had no capacity under its memorandum and articles of association to enter into the loan agreement. The fact that the second, third and fourth defendants might be acting beyond their powers as directors, do not necessarily mean that they were acting beyond the company's capacity. Such a distinction, should in our view be made in this case, and as such the attempt by Mr Samuel to show that the loan transaction and a fortiorari the guarantee was invalid or tainted with irregularities had no basis. (See *Rolled Steel Products (Holdings) Ltd v British Steel Corp & Ors*.[2]) As such we were not persuaded that the summary judgment was not a regular and final judgment.

Coming back to the appeal proper, on the issue of propriety of the striking out of the bankruptcy petition against Mr Samuel, we found two of the arguments canvassed by counsel for the appellant bank deserved serious consideration. The first was that the learned judge had erred in law when he held that Mr Samuel's counterclaim exceeded or equalled the judgment sum of RM11.2m on which the bankruptcy notice dated 15 January 1990 was based, within the meaning of s 3(1)(i) of the Bankruptcy Act 1967 ('the Act'). The second argument was that the learned judge was wrong in holding that s 5(2) of the Act was applicable and the failure to comply with the condition imposed by that section was fatal to the creditor's petition.

On the first argument, s 3(1)(i) provides:

> (1) A debtor commits an Act of bankruptcy ... :
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> ...
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order ..., or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in the Federation, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

On the s 3(1)(i) argument, it was conceded by both parties that firstly, the bankruptcy notice required no compliance if Mr Samuel could satisfy the court that he had a counterclaim against the appellant bank which equalled or exceeded the judgment sum of RM11.2m and that secondly, the said counterclaim could not be set up during the action in which the summary judgment was obtained on 26 February 1988. Both matters were in fact expressly stated in the bankruptcy notice itself. At p 4 of his judgment, the learned judge, after quoting the provision of s 3(1)(i), arrived at the following conclusion:

> But that [ie s 3(1)(i)] is not of any direct relevance here because it refers to a counterclaim which the debtor could not set up in the action in which judgment was obtained against him. Here however a counterclaim has been set up in the action and is pending. The actual existence of a pending counterclaim that equals or exceeds the amount of the judgment debt must, in the context, be at least as effective as the situation envisaged by the said s 3(1)(i) of a judgment debtor who can satisfy the court that he has such a counterclaim but could not set it up in the action in which judgment against him was obtained. It seems to me that accordingly in the face of the existence of the said pending counterclaim it cannot be said that the debtor has committed an act of bankruptcy.

Thus, notwithstanding the inapplicability of s 3(1)(i), the learned judge seemed to be of the opinion that so long as the pending counterclaim equalled or exceeded the judgment sum quantified in the bankruptcy notice, the judgment debtor was entitled to ignore the notice even if the counterclaim was one which Mr Samuel did not but could have set up in the action in which the summary judgment was obtained on the ground that such counterclaim could automatically prove the absence of any act of bankruptcy. Before dealing with the correctness of the opinion, it is necessary to state that three ingredients must be satisfied before the existence of a counterclaim by the debtor can be a defence to a judgment creditor's petition. In *Sovereign General Insurance Sdn Bhd v Koh Tian Bee*[3] at p 305, the Federal Court speaking through Lee Hun Hoe CJ, held that: 'If the respondent was making a cross-demand he must quantify it'.

The burden of proof is on the respondent to show by the affidavit that the counterclaim must be capable of being quantified in terms of money and the affidavit must quantify it. This is so stated by Warner J in *Re a debtor (No 75N of 1982, Warrington), ex p the debtor v National Westminster Bank and another appeal.*[4] The second ingredient to be satisfied in the affidavit is that the counterclaim must be put forward in good faith and must have reasonable probabilities of success. Lastly, the affidavit must show that the counterclaim could not have been set up in the action in which the judgment relied on by the creditor was obtained.

In the present appeal, whilst the counterclaim on general damages was capable of being quantified in terms of money, it had not however been quantified. Thus, apart from special damages in the sum of RM6.25m, there was nothing in any of the affidavit filed by Mr Samuel to indicate any other quantified sum showing that the total counterclaim exceeded or equalled the judgment sum of RM11.2m. Further, the probability of success of the counterclaim had not been mentioned or shown in the affidavit. Finally, the fact that Mr Samuel had filed the counterclaim before the

actual hearing of the O 14 application, was not in dispute, and as such he could not now say that the counterclaim was one which he could not set up when the summary judgment was obtained within the meaning of s 3(1)(i).

We were therefore of the opinion that it was wrong for the learned judge to extend the application of s 3(1)(i) to cover all pending counterclaims irrespective of whether they could or could not have been filed at the hearing in which summary judgment was obtained. Such an interpretation would be tantamount to altering the words used by the legislature in s 3(1)(i) and ignoring the established principle of interpretation of statutes where the literal meaning of words used is clear and reflective of the purpose of the provision (see *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors*[5] and *R v Broadcasting Complaints Commission, ex p Owen*[6]). Having failed to satisfy all the three ingredients in his affidavits, it was clear that Mr Samuel had not proved that he had a counterclaim which equalled or exceeded the appellant bank's claim within the meaning of s 3(1)(i) of the Act. The striking out of the appellant bank's petition on this ground was therefore wrong in law.

As regards the second argument, the question that arose was whether in this particular case the bank as a petitioning creditor was a secured creditor vis-a-vis, Mr Samuel as a guarantor, within the meaning of s 5(2) of the Act. Section 5(2) provides:

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

According to Mr Matthias Chang, counsel for the appellant, one of the objects of this subsection was to ensure that a judgment debtor who had given security for his debt should not be made a bankrupt, if the value of the security exceeded the judgment debt or unless the debtor had other creditors and the secured creditor was willing to give up the security for the benefit of such creditors should the petition be granted. Learned counsel also brought to our attention two conflicting decisions of the High Court on the proper interpretation of s 5(2) to determine when the requirement therein is applicable, having regards to the definition of 'secured creditor' in s 2 of the Act which provides:

> 'secured creditor' means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment;

In *Re Rabindera Singh s/o Arjan Singh, ex p Malaysian International Bankers Bhd*,[7] Siti Norma Yaakob J citing the case of *Ex p Nest Riding Union Banking Co*,[8] held at p 859:

> From the definition, it is clear that the requirement to state the petitioner's willingness to give up the security or give the value of the security in the petition under s 5(2) only applies where the security is supplied by the debtor himself and not by some other third party.

In the petition before her Ladyship, the debtor in the judgment creditor's petition whose liability arose as a guarantor, did not provide for the security but was given by the principal borrower (which is similar to the present appeal). For that reason, it was held that the requirement of s 5(2) did not apply.

But in a latter case, Shaik Daud J in *Yip Kim Khoon v The Hongkong & Shanghai Banking Corp*[9] would appear to hold the opposite view. In giving a wider meaning to the word 'debtor' in the s 2 definition of the term 'secured creditor', his Lordship held at p 1632:

> Counsel for the creditor contends that since the property did not belong to the debtor in this petition but to a third party there is no need to mention this in the petition. He contends that in s 5(2) of the Act it talks of property of debtor and this means the principal debtor. He cited s 94 of the Contracts Act 1950. With respect this section does not help the creditor because it gives the surety (as the judgment debtor in this petition is) entitlement to the benefit of every security which the creditor has against the principal debtor. Thus in this petition the judgment debtor (Yip Kim Khoon) is entitled to the benefit of the security (the assigned property) which the creditor has against the principal debtor (Bornion Co (Kuala Lumpur) Sdn Bhd). In any case I feel that the word debtor in s 5(2) of the Act must be given a wider meaning then just the principal debtor. A surety against whom a judgment had been entered is for all intents and purposes a debtor to the judgment creditor.

We did not know why the *Rabindera Singh* case[7] was not cited or discussed in *Yip Kim Khoon*.[9] Mr Lingam, counsel for the respondent had urged us to reject *Rabindera Singh*[7] and to adopt *Yip Kim Khoon*.[9] We disagreed. In our view, what was crucial here was to determine whether under s 5(2) the appellant bank as a petitioning creditor was a 'secured creditor' not in the loan agreement with the principal borrower, but under the contract of guarantee with Mr Samuel from which had emanated Mr Samuel's liability in the O 14 judgment and upon which in turn the bankruptcy notice and petition were based. In short, Mr Samuel was the only 'debtor' in the bankruptcy proceeding before the court on account of the judgment, and his alleged act of bankruptcy was governed by s 3(1)(i) for non-compliance with a bankruptcy notice. In the circumstances, we are of the opinion that the word 'debtor' appearing in both ss 2 and 5(2) must mean and should be limited to the actual 'debtor' involved in the particular bankruptcy proceeding and should not include any other debtors that may exist. Thus, in this particular petition, to clothe the appellant bank as a 'secured creditor' under s 5(2), it must be shown that the appellant bank was holding a mortgage, charge or lien on the property of Mr Samuel, as a security for the debt of RM11.2m due to the bank from Mr Samuel. It was common ground that Mr Samuel had not given any security to the bank for his debt as a guarantor. Both the landed security and debenture, were admittedly given by the principal borrower and none by Mr Samuel. In fact, the contract of guarantee executed by Mr Samuel was a third form of collateral or security given to the bank in addition to the landed charge and debenture. Thus, in this particular bankruptcy proceeding as far as Mr Samuel was concerned, the appellant bank was not a secured creditor within the meaning

of s 5(2), and as such non-compliance with its requirement could not be fatal to the petition. Further, the 'wider' or liberal interpretation of s 5(2) advocated by Shaik Daud J was a serious departure from the established principle of strict interpretation of bankruptcy legislation [see 3 *Halsbury's Law of England* (4th Ed) at pp 161 and 162 and *Low Mun v Chung Khiaw Bank Ltd*[10] at p 265]. We accordingly approved the judgment of Siti Norma J in *Rabindera Singh*[7] in preference to *Yip Kim Khoon*.[9]

Mr Lingam had referred to us the case of *Development and Commercial Bank Bhd v Almas Motors Corp (M) Sdn Bhd*[11] where the provisions of ss 92 and 94 of the Contracts Act 1950 were considered in the O 14 application against a guarantor. For the purpose of interpretation of s 5(2) of the Act, we found no real purpose or relevancy in getting assistance from these provisions of the Contracts Act 1950. Sections 92 and 94 of the Contracts Act 1950 may be relevant to determine the liability of a guarantor at the hearing in which judgment was sought against the guarantor as a debtor, but not for the purpose of determining the term 'secured creditor' under s 5(2) which has been clearly defined by s 2 of the Act.

For the reasons given, we were of the view that the learned judge had erred in law on the interpretation of both ss 3(1)(i) and 5(2) of the Act. The two grounds of appeal must succeed, and we therefore allowed the appeal with costs both here and below, and set aside the order striking out the judgment creditor's petition. The petition was therefore restored and should accordingly be heard on its merits.

Appeal allowed.

Reported by Prof Ahmad Ibrahim